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ORIGINAL



215 706

February 1, 2006

VIA HAND DELIVERY - RETURN COPY

Hon. Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, NW (7th fl.)
Washington, DC 20423-0001

ENTERED
Office of Proceedings

FEB - 1 2006

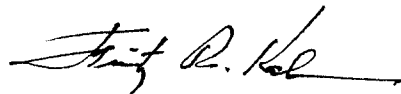
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Enclosed for filing in STB Finance Docket No. 34818, City of Jersey City, et al.-Petition for Declaratory Order, are the original and ten copies of the Reply of the Intervenor, 212 Marin Boulevard, L.L.C., et al.

Additional copies of this letter and of the Reply are enclosed for you to stamp to acknowledge your receipt of them and to return to me via the messenger.

If you have any question concerning the foregoing which you believe I may be able to answer or if I otherwise can be of assistance, please let me know.

Sincerely yours,


Fritz R. Kahn

encl.

cc: Charles H. Montagne, Esq.
Robert M. Jenkins, III, Esq.

215706

ORIGINAL

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC



STB Finance Docket No. 34818

CITY OF JERSEY CITY, RAILS TO TRAILS CONSERVANCY,
PENNSYLVANIA RAILROAD HARSIMUS STEM EMBANKMENT
PRESERVATION COALITION,
AND NEW JERSEY STATE ASSEMBLYMAN LOUIS M. MANZO –
PETITION FOR DECLARATORY ORDER

REPLY
OF

212 MARIN BOULEVARD, L.L.C., 247 MANILA AVENUE, L.L.C.
280 ERIE STREET, L.L.C., 317 JERSEY AVENUE, L.L.C.,
354 COLES STREET, L.L.C., 389 MONMOUTH STREET, L.L.C.,
415 BRUNSWICK STREET, L.L.C. AND 446 NEWARK AVENUE, L.L.C.

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212 MARIN BOULEVARD, L.L.C., et al.

Due and dated: February 1, 2006

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC

STB Finance Docket No. 34818

CITY OF JERSEY CITY, RAILS TO TRAILS CONSERVANCY,
PENNSYLVANIA RAILROAD HARSIMUS STEM EMBANKMENT
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Intervenors, 212 Marin Boulevard, L.L.C., 247 Manila Avenue, L.L.C., 280 Erie Street, L.L.C., 317 Jersey Avenue, L.L.C., 354 Coles Street, L.L.C., 389 Monmouth Street, L.L.C., 415 Brunswick Street, LLC and 446 Newark Avenue, L.L.C. (hereinafter collectively referred to as “SLH Properties”), pursuant to 49 C.F.R. 1104.13, reply to the Petition for Declaratory Order of the Petitioners, City of Jersey City, Rails to Trails Conservancy, Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition and New Jersey State Assemblyman Louis M. Manzo (hereinafter collectively referred to as “Jersey City”), filed January 12, 2006, as follows:

A.

Introduction

1. SLH Properties agree that the Board, pursuant to 5 U.S.C. 554(e), should commence a declaratory order proceeding to terminate a controversy between Jersey City and Consolidated Rail Corporation ("Conrail") and to remove uncertainty as to the status of a right of way extending between a point near the former Waldo Avenue Yard and a point near the former Harsimus Cove Yard in Jersey City, NJ.

2. Segments of the right-of-way were purchased from Conrail in July 2005 by SLH Properties as realty to be developed for residential housing.

3. SLH Properties respectfully disagrees with the allegations of Jersey City that Conrail could not sell the segments to SLH Properties, because the right-of-way continued to be that of an active line of railroad and, therefore, could not be abandoned by Conrail without having secured the advance authorization of the Board without violating 49 U.S.C. 10903.

4. Conrail did not acquire the property as an active line of railroad, but, rather, it acquired the property as a spur, which, pursuant to 49 U.S.C. 10906, Conrail lawfully abandoned prior to the sale of the segments to SLH Properties.

5. SLH agrees that pending the termination of the declaratory order proceeding it will not demolish or remove any piers or other structures on the property.

B.

Declining railroad operations

1. There is no question that the owner of the property between Waldo Avenue Yard and Harsimus Cove Yard, The United New Jersey Railroad and Canal Company and its lessee, the

Pennsylvania Railroad, operated an active railroad line,¹ and, if they had continued to operate it, the railroad line's abandonment would have required the advance authorization of the Interstate Commerce Commission ("ICC"), pursuant to what then was 49 U.S.C. 1(18).

2. In describing the property, Jersey City in its Petition relies upon unofficial and unauthenticated documentation. For example, in asserting that the right-of-way extended between Milepost 2.54 at Waldo Avenue Yard and Milepost 1.3 at Luis Munoz Marin Boulevard, formerly Henderson Street, west of Harsimus Cove Yard, as it does at pages 8-9 of its Petition, Jersey City relies upon a Conrail track maintenance chart, Exhibit A attached to its petition and Exhibit E: Appendix B attached to the Verified Statement of Mr. Richard James. Relevant and authoritative would have been the Valuation Map of The United New Jersey Railroad and Canal Company, which shows the right-of-way including the segments purchased by SLH Properties extending from Milepost 0.18 near Waldo Avenue Yard and Milepost 0.88 at Henderson Street.

3. At. page 17-23 of its Petition, Jersey City cites four ICC decisions in which the agency held a railroad line remained a railroad line, requiring its section-1(18) abandonment authorization, notwithstanding that the railroad's operations had changed and were more in the nature of a spur, which, pursuant to what then was 49 U.S.C. 1(22), required no abandonment authorization from the ICC.² The ICC's decisions, however, were rendered in proceedings in

¹ The Pennsylvania Railroad merged with the New York Central Railroad in 1968 to form the Penn Central Transportation Company.

² Chelsea Property Owners-Aban.-- The Consol. R. Corp., 8 I.C.C.2d 773 (1992), aff'd sub nom. Consolidated Rail Corp. v. I.C.C., 29 F.3d 706 (D.C. Cir. 1994); Clinchfield Railroad Co Abandonment, 295 I.C.C. 41 (1955); Oregon Short Line R. Co. Abandonment, 267 I.C.C. 633 (1947); Old Colony Railroad Co., et al., Trustees Abandonment, 224 I.C.C. 681 (1938).

which the same railroad which had operated the line of railroad sought after a change of circumstances to characterize the property as a spur. That is not the situation here, and the cited ICC decisions are inapposite.

4. This Board has come to a different conclusion when there has been a transfer of the property from one entity to another. In numerous decisions this Board has held that a railroad's use of its property does not necessarily restrict or define an acquiring railroad's use thereof. Only recently, in STB Finance Docket No. 34509, Kaw River Railroad, Inc.-Acquisition and Operation Exemption-The Kansas City Southern Railway Company, served May 3, 2005, the Board said:

The Board has authorized numerous transactions under our class exemption processes where, as here, a noncarrier entity would become a rail carrier by virtue of its lease and operation of tracks owned by another entity . In many such instances, the tracks to be leased and operated in common carrier service were previously excepted tracks under section 10906 or private tracks beyond the Board's licensing authority, and in some cases, the tracks in question were previously used as switching or yard tracks by a prior operator, just as was the case here [footnotes omitted]

Accord, STB Finance Docket No. 34483, SMS Rail Service, Inc.-Petition for Declaratory Order, served January 24, 2005; STB Finance Docket No. 34486, Ohio Valley Railroad Company-Acquisition and Operation Exemption-Harwood Properties, Inc., served September 28, 2004; STB Finance Docket No. 34514, Raritan Central Railways, L.L.C.-Operation Exemption-Heller Industrial Parks, Inc., served June 25, 2004; STB Finance Docket No. 34252, Union Pacific Railroad Company-Operation Exemption-In Yolo County, served December 5, 2002. Such is the situation here, where what may have been a railroad line before the Penn Central Transportation Company went into bankruptcy in 1970, was conveyed to Conrail as a

spur.

5. By then the car-float operations from the Harsimus Cove Yard had ceased. The tracks stub-ended at Harsimus Cove. The abattoirs had relocated, and only two or three shippers continued to receive rail service. Rail service was rendered on a demand and not in accordance with a schedule. Very little traffic moved over the tracks. The tracks were approximately one mile long. The tracks were in relatively poor condition. No station was served by the tracks. In short, the tracks had assumed the characteristics of a spur. See, Finance Docket No. 33522, Chicago South Shore and South Bend Railroad-Petition for Declaratory Order-Status of Track at Hammond, IN, served December 17, 1998; Battaglia Distributing Co., Inc. v. Burlington Northern, 2 S.T.B.2d 323, 326-27 (1997); CNW-Aban. Exemp.-In McHenry County, IL, 3 I.C.C.2d 366, 367 (1987, rev'd on other grounds sub nom., Illinois Commerce Commission v. I.C.C., 879 F.2d 917 (D.C. Cir. 1989)

C.

The Final System Plan

1. The bankruptcy of the Penn Central Transportation Company and the seven other railroads in the Northeast was deemed to be beyond the capacity of the bankruptcy courts to deal with and led to the enactment of the Regional Rail Reorganization Act of 1973.³ In upholding the constitutionality of the Act, the Supreme Court in Blanchette v. Connecticut General Insurance Corp., 419 U.S. 102, 109 (1974), declared, "Congress concluded that solution of the crisis required reorganization of the railroads, stripped of excess facilities, into a single, viable system operated by a private for-profit corporation."

³ Pub. L. 93-236, 87 Stat. 985, January 2, 1974, 45 U.S.C. 701, et seq.

2. The United States Railway Association ("USRA") was established as a new government corporation charged with the task of preparing a Final System Plan for restructuring the railroads in reorganization into a financially self-sustaining rail system, which became Conrail. The first and foremost goal of the Final System Plan was "the creation, through the process of reorganization, of a financially self-sustaining rail and express service system in the region." 45 U.S.C. 716(a).

3. In short, USRA looked at the railroad system in the Northeast as it then existed and designated those railroad lines which were anticipated to be viable for operation by Conrail and those which could be useful for railroad operations in the area if subsidized by public bodies or shippers. It mattered not whether a property previously may have been a thriving railroad line, if the staff and the Board of USRA viewed it as not warranting designation for operation as a railroad line by Conrail or subsidization by public bodies or shippers, it was not included in the Final System Plan

4. The tracks between what had been Waldo Avenue Yard and what had been Harsimus Cove Yard were designated in the Final System Plan as neither a line of railroad to be operated by Conrail nor a light-density line eligible for subsidization by a public body or shippers. The tracks were conveyed to Conrail as a spur appurtenant to the railroad line designated to be operated by Conrail, namely the railroad line identified as Line Code 1420 between Milepost 1.0 in Jersey City and Milepost 7.0 in Harrison, a segment of the railroad line known as the Passaic and Harsimus Line. See, page 272, vol. I of the Final System Plan.

5. The segments of the right-of-way purchased by SLH Properties following their abandonment by Conrail extended between Milepost 0.18, a point near what had been the Waldo

Avenue Yard, and Milepost 0.88, a point near Luis Munoz Marin Boulevard, formerly Henderson Street, west of Harsimus Cove Yard. The tracks clearly were not a part of the railroad line between Milepost 1.0 in Jersey City and Milepost 7.0 in Harrison. They, however, were conveyed as a part of the Line Code 1420 deed from Trustee of The United New Jersey Railroad and Canal Company to Conrail. The Final System Plan made clear that the conveyances to Conrail included, among other things, appurtenant "spur and storage tracks." See, page 241, vol. I of the Final System Plan.

D.

The spur's abandonment

1. From the day it began operating, Conrail treated the tracks extending between what had been Waldo Avenue Yard and Harsimus Cove as a spur. While for a few years it rendered service on the spur, as Conrail found other and better uses for the property, Conrail abandoned segments. It abandoned the Harsimus Cove area and made it available for commercial and residential development. Following the abandonment of the River Line, the spur was without an effective connection to a railroad line, and no railroad service has been performed on the spur in more than a decade. Conrail removed the tracks and ties and, at the urging of the City of Jersey City, it removed the bridges which crossed the intersecting streets -- Grove Street, Erie Street, Jersey Avenue, Coles Street and Monmouth Street. All this was done by Conrail without securing the advance abandonment authorization from the ICC or this Board. Moreover, all this was done by Conrail with the knowledge and acquiescence of the City of Jersey City.

2. Indeed, the City of Jersey City through its Redevelopment Agency entered into serious negotiations with Conrail for the purchase of the very segments of the right-of-way between what

had been Waldo Avenue Yard and what had been the Harsimus Cove Yard which ultimately were bought by SLH Properties. At no time did the City of Jersey City express any reluctance to purchase the segments, because they were part of a line of railroad; at no time did the City of Jersey City indicate that it was hesitant to buy the segments, because this Board had not authorized the railroad line's abandonment.

3. In its Opposition, filed January 23, 2006, Jersey City for the first time contends that what remains of the right-of-way between what had been Waldo Avenue Yard and Harsimus Cove Yard should be preserved by this Board for possible future use for light-rail passenger service. Of course, this Board lacks jurisdiction over single-state passenger operations. Napa Valley Wine Train, Inc. - Pet. For Declaratory Order, 7 I.C.C.2d 954 (1991).

4. The pier which was demolished by SLH Properties had not been designated a historic structure and its removal has been permitted by the appropriate authorities of the City of Jersey City. Nevertheless, to enable the Board to dispose of the declaratory order proceeding with all of the care and attention it deserves and to obviate the need of a housekeeping stay, as was sought by Jersey City in its Opposition, filed January 23, 2006, SLH Properties agrees that it will not demolish or remove any pier or other structure on the property so long as the declaratory order proceeding remains pending before the Board.

5. The foregoing are asserted as offers of proof. SLH Properties, if afforded the opportunity by this Board, will introduce testimony and exhibits supporting their assertions.

WHEREFORE, Intervenors, 212 Marin Boulevard, L.L.C., 247 Manila Avenue, L.L.C., 280 Erie Street, L.L.C., 317 Jersey Avenue, L.L.C., 354 Coles Street, L.L.C., 389 Monmouth Street, L.L.C., 415 Brunswick Street, L.L.C. and 446 Newark Avenue, L.L.C., ask that the Board

institute a declaratory order proceeding to resolve the dispute between the City of Jersey City, Rails to Trails Conservancy, Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition and New Jersey Assemblyman Louis M. Manzo, on the one hand, and, on the other, Consolidated Rail Corporation and to determine that the right-of-way extending between what had been Waldo Avenue Yard and what had been Harsimus Cove Yard was a spur the abandonment of which could be effected by Consolidated Rail Corporation without the advance authorization of this Board and that, therefore, the sale of segments of it to the Intervenor was proper and lawful.

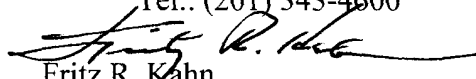
Intervenor recommends that a reasonable procedural schedule to be promulgated by this Board would call for the Petitioners to file their opening statement within 30 days' time, Conrail and the Intervenor to file their reply statement within 45 days thereafter and Petitioners to file their rebuttal statement within 15 days thereafter.

Respectfully submitted,

212 MARIN BOULEVARD, L.L.C., et al.

By their attorneys,

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Hackensack, NJ 07601
Tel.: (201) 343-4600

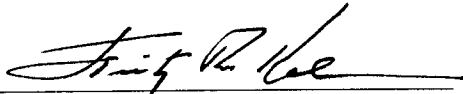

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Due and dated: February 1, 2006

CERTIFICATE OF SERVICE

I certify that I this day served the foregoing Reply upon the Petitioners, City of Jersey City, Rails to Trails Conservancy, Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition and New Jersey State Assemblyman Louis M. Manzo, and upon the Respondent, Consolidated Rail Corporation, by facsimile transmitting and mailing copies thereof to their respective counsel, Charles H. Montange, Esq., and Robert M. Jenkins, III, Esq.

Dated at Washington, D.C., this 1st day of February 2006


Fritz R. Kahn